IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,042

THE STATE OF FLORIDA,

Petitioner,

vs.

FRANCISCO RAMOS, et al.,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner was the Appellant in the Third District Court of appeal and the prosecution in the Criminal Division of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. Respondent was the Appellee in the District court and the defendant in the trial court.

In this brief, the parties will be referred to as they appear before this Honorable Court. The symbol "App." will be used to designate the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Respondent, **LAZARO DIAZ,** was arrested with Jose and Francisco Ramos and charged with armed trafficking in cocaine, burglary and unlawful possession of a firearm while engaged in a criminal offense. (App. 1, p.2). Diaz filed a motion to dismiss the charges alleging a due process violation and objective entrapment. Jose and Francisco joined in the motion at a later date. (App. 1, p.2).

Following a hearing on the motion, the trial court dismissed the charges against the defendants based on the objective entrapment test enunicated in Cruz v. State, 465 So. 2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985). (App. 1, p.3). Upon reconsideration, the trial court found that the facts presented justified dismissal under the objective entrapment test, but based dismissal of the charges on the due process argument. (App. 1, p.3).

Petitioner, the State of Florida, appealed the dismissal, arguing that the defendants' due process rights were not violated. (App. 1, p.5). The State also argued that the objective entrapment test set forth in Cruz had been abolished by the enactment of §777.201 of the Florida Statutes. (App. 1, p.5).

The Third District Court of Appeal agreed that the defendants' due process rights had not been violated, but affirmed the dismissal of the charges filed against Diaz on the ground of objective entrapment. (App. 1, pp.4, 6). Because Jose and Francisco Ramos had been induced by Diaz and not the confidential informant, the trial court's order dismissing the charges against Jose and Francisco was reversed. (App. 1, p.6).

The State's Motion for Rehearing and Motion for Rehearing En Banc was denied by the Third District Court of Appeal on December 22, 1992. (App. 2; App. 3)

Notice invoking the jurisdiction of this Honorable Court was filed on or about January 5, 1993.

SUMMARY OF THE ARGUMENT

The instant opinion is in express and direct conflict with Herrera v. State, 17 Fla. L. Weekly S84 (Fla. February 7, 1992), State v. Pham, 17 Fla. L. Weekly D607 (Fla. 1st DCA March 2, 1992) and other district court opinions. Discretionary review should be exercised to resolve this conflict and ensure uniformity among the districts.

POINT ON APPEAL

WHETHER THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH HERRERA V. STATE, 17 S 84 (FLA., February 7, 1992, STATE V. PHAM, 17 FLA. L. WEEKLY D607 (FLA. 1st DCA MARCH 2, 1992) AND OTHER DISTRICT COURT OPINIONS?

ARGUMENT

THE OPINION OF THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH HERRERA V. STATE, 17 S84 (FLA. FEBRUARY 7, 1992, STATE V. PHAM, 17 FLA. L. WEEKLY D607 (FLA. 1st DCA MARCH 2, 1992) AND OTHER DISTRICT COURT OPINIONS?

Section 777.201 of the Florida Statutes (1989) expressly states that the "issue of entrapment shall be tried by the trier of fact." In Herrera v. State, 17 Fla. L. Weekly S84 (Fla. February 7, 1992), this Honorable Court was asked to consider whether §777.201 impermissibly and unconstitutionally shifted the burden of proof to the defense. This question was answered in the negative since the state is not relieved of the burden of proving each element of the crime charged where the defense claims entrapment and is required to persuade the jury that he or she was entrapped. 17 Fla. L. Weekly at 585. By reaching this decision, this Honorable Court necessarily and implicitly ruled that the statute was in all other respects constitutionally sound and in full force and effect. However, because the objective entrapment defense could not be applied to the facts of Herrera, the issue of whether the objective entrapment defense remained viable in light of 777.201 was not reached. 17 Fla. L. Weekly at 585. (Justice Kogan concurring).

This decision was reached by the First District Court of appeal in State v. Pham, 17 Fla. L. Weekly D607 (Fla. 1st DCA March 2, 1992; Simmons v. State, 590 So. 2d 442 (Fla. 1st DCA 1991); and State v. Munoz, 586 So. 2d 515 (Fla. 1st DCA 1991). In the foregoing cases, the First District Court of Appeal recognized the uncertainty among the districts and ruled that §777.201, Fla. Statutes (1987) "effectively abolished the objective entrapment test articulated in Cruz v. State, 465 So. 2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985)." 17 Fla. L. Weekly at D607.

The Third District Court of Appeal in the instant case reversed Respondent's conviction because "the first part of the Cruz test was not satisfied." (App. 1, p.5). In ruling that the first part of the Cruz test was not satisfied in the instant case, the Third District effectively ruled that the Cruz test of objective entrapment is viable notwithstanding §777.201, Florida Statutes (1987), and implicitly ruled that §777.201 is void and of no effect. These rulings expressly and directly conflict with the decisions in Herrera v. State, State v. Pham, and Simmons v. State, and State v. Munoz. Both State v. Munoz and Simmons v. State, are currently pending before this honorable court (case numbers 78,900 and 79,094 respectively). Therefore, discretionary review jurisdiction should be exercised by this Honorable Court to settle the conflict among the districts and ensure statewide uniformity.

CONCLUSION

WHEREFORE, based upon the foregoing Petitioner respectfully requests that this court grant discretionary review in the instant cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT ON JURISDICTION** was furnished by mail to **GERARDO REMY**, Counsel for Lazaro Diaz, 2400 Coral Way, Suite 501, Miami, Florida 33145 and **HARVEY SEPLER**, Counsel for Jose and Francisco Ramos, **OFFICE OF THE PUBLIC DEFENDER**, 1351 N. W. 12th Street, Miami, Florida 33125 on this 8th day of January, 1993.

ANGELICA D. ZAYAS
Assistant Attorney General

/ml

IN THE SUPREME COURT OF FLORIDA

CASE NO. 91-1072

THE STATE OF FLORIDA,

Appellant

vs.

FRANCISCO RAMOS, et al.,

Appellee

_____/

APPENDIX TO BRIEF OF JURISDICTION

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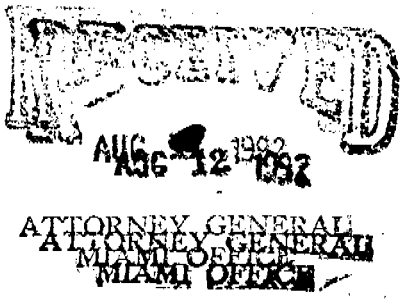
AMF

91-31564-K

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION AND
IF FILED, DISPOSED OF.



IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, 1992

THE STATE OF FLORIDA, **

Appellant, **

vs. ** CASE NO. 91-470

FRANCISCO RAMOS, et al., ** #90-1186A,B,C

Appellees. **

Opinion filed August 11, 1992.

An Appeal from the Circuit Court of Dade County, Steven Levine, Judge.

Robert A. Butterworth, Attorney General and Angelica D. Zayas, Assistant Attorney General, for appellant.

Bennett H. Brummer, Public Defender and Harvey J. Sepler, Assistant Public Defender, for appellees Francisco Ramos and Jose Ramos; Gerardo A. Remy, Jr., for appellee Diaz.

Before BASKIN, GERSTEN and GODERICH, JJ.

GODERICH, Judge.

The State of Florida appeals from the trial court's order dismissing the charges against the defendants, Lazaro Diaz

Appl

[Diaz], Jose Ramos [Jose] and Francisco Ramos [Francisco]. We affirm as to Diaz, but reverse and remand for further proceedings as to Jose and Francisco.

The defendants were arrested and later charged with armed trafficking in cocaine, burglary, and unlawful possession of a firearm while engaged in a criminal offense. Thereafter, Diaz filed a motion to dismiss the charges alleging a due process violation and objective entrapment. At a later date, Francisco and Jose joined in the motion.

At the hearing on the motion to dismiss, Diaz testified that he met Salvador Xique, the confidential informant, approximately one month prior to his arrest. Diaz testified that the confidential informant called him fifteen or sixteen times to tell him about a business deal in which Diaz could make a lot of money. Despite Diaz's lack of interest, the confidential informant continued to call him.

The confidential informant explained to Diaz that he would be given a key to a warehouse where he would pick something up. The confidential informant introduced Diaz to another man who would ultimately give the key to Diaz. The confidential informant supplied Diaz with firearms to use during the transaction and told Diaz to go to the warehouse with two other men. Diaz went to the warehouse with Francisco and Jose. Diaz testified that he went to the warehouse only because the confidential informant called him more than fifteen times.

Detective Garcia testified that at the request of Detective Fernandez, he met with Diaz at a cafeteria while working

undercover. At that meeting, Detective Garcia informed Diaz that he was expecting a shipment of cocaine and that he would contact him when it arrived.

Detective Fernandez testified that the confidential informant was working for monetary reasons and that he had already been paid two or three hundred dollars. Detective Fernandez also testified that payment was not contingent on the confidential informant's testimony at trial or on the arrest of any individuals. Additionally, Detective Fernandez testified that the confidential informant was not performing under any substantial assistance agreement, nor were there any charges pending against the confidential informant. Detective Fernandez also explained that Detective Garcia was introduced to Diaz in order to remove the confidential informant from further negotiations.

The trial court ruled on the motion to dismiss stating that based on the due process argument, it was "reduc[ing] the charges from armed trafficking or any charges related to the use of a firearm, to unarmed." Additionally, the court stated that it was dismissing all charges based on the objective entrapment test enunciated in Cruz v. State, 465 So.2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985).

Later, the trial court reconsidered its prior ruling on the motion to dismiss and granted the motion to dismiss based on the due process argument. Additionally, the court found that the facts in the present case justified dismissal under the objective entrapment test, although it was not dismissing the charges on that ground.

The trial court, relying in part on State v. Glosson, 462 So.2d 1082 (Fla. 1985), entered its written order dismissing all charges based on the alleged due process violation. The State appeals from this order.

The State contends that the defendants' due process rights were not violated. We agree.

The Supreme Court of Florida in State v. Hunter, 586 So.2d 319 (Fla. 1991), "limited the holding of State v. Glosson, 462 So.2d 1082 (Fla. 1985), to cases where the confidential informant's contingent fee was conditioned on his trial testimony." Lewis v. State, ___ So.2d ___ (Fla. 3d DCA case no. 91-1072, opinion filed March 24, 1992) [17 F.L.W. D793]. In the instant case, the trial court's order was based, in part, on its finding that the confidential informant "operated on essentially a contingent fee basis" and that the confidential informant "would have been a key witness in the case had the matter proceeded to trial." These findings, however, are not supported by the record. See State v. Navarro, 464 So.2d 137, 138 (Fla. 3d DCA 1984) (trial court's findings must be accepted by appellate court only if there is evidence to support findings); State v. Delgado-Armenta, 429 So.2d 328, 329 (Fla. 3d DCA 1983) ("trial judge's conclusions will not be overturned where there is substantial competent evidence to support it."). Detective Fernandez's uncontradicted testimony showed that the payment to the confidential informant was not conditioned on the informant's testimony at trial. Therefore, since the confidential informant's fee was not conditioned on his testimony at trial, we must reject the defendants' due process argument.

The defendants also argue that the charges must be dismissed based on their objective entrapment argument.[1] We agree as to Diaz, but disagree as to Francisco and Jose.

The Supreme Court of Florida in Cruz v. State, 465 So.2d 516, 522 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985), stated:

> To guide the trial courts, we propound the following threshold test of an entrapment defense: Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity.

In the instant case, as to Diaz, the first prong of the Cruz test was not satisfied. The trial court found that there "was no history, information, or intelligence known to law enforcement of any involvement by these Defendants in any narcotics activities of drug 'rip-offs' before the confidential informant brought the Defendants into the scheme." This finding is supported by the evidence. The confidential informant contacted Diaz fifteen or sixteen times in an attempt to convince Diaz to get involved in the drug transaction. When the confidential informant contacted Diaz, Diaz was not involved in any "specific ongoing criminal activity." In addition, the second prong of the Cruz test was not satisfied where the police used means which were not

---

[1] The State contends that Section 777.201, Florida Statutes (1989), has the effect of abolishing the objective entrapment test enunciated in Cruz. We disagree. See Lewis v. State, ___ So.2d ___ (Fla. 3d DCA case no. 91-1072, opinion filed March 24, 1992) [17 F.L.W. D793, D794 n.1].

"reasonably tailored to apprehend those involved in the ongoing criminal activity." Cruz, 465 So.2d at 522. Accordingly, although we disagree with the trial court's rationale, we affirm the portion of the trial court's order dismissing the charges against Diaz.

As to Francisco and Jose, it was Diaz who induced them to commit a crime, not the confidential informant. "When a middleman, not a state agent, induces another person to engage in a crime, entrapment is not an available defense." State v. Hunter, 586 So.2d 319 (Fla. 1991); see also State v. Garcia, 528 So.2d 76 (Fla. 2d DCA), rev. denied, 536 So.2d 244 (Fla. 1988); Acosta v. State, 477 So.2d 9 (Fla. 1985). Accordingly, we reverse the portion of the trial court's order dismissing the charges against Francisco and Jose and remand for further proceedings.

Affirmed in part, reversed in part and remanded for further proceedings.

91-131569 tk

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 91-470

THE STATE OF FLORIDA,

Appellant,

vs.

FRANCISCO RAMOS, et al.,

Appellee.
_____/

MOTION FOR REHEARING AND
MOTION FOR REHEARING EN BANC

Appellant, the **STATE OF FLORIDA**, by and through undersigned counsel, pursuant to Rule 9.330, Fla.R.App.P., respectfully moves this Honorable Court for rehearing in the above-styled cause and as grounds therefore states:

1. Appellees, **LAZARO DIAZ** ("Diaz"), **FRANCISCO RAMOS** ("Francisco"), and **JOSE RAMOS** ("Jose"), were arrested on March 22, 1990, and were later charged with armed trafficking in cocaine, unlawful possession of a firearm while engaged in a criminal offense and burglary. (R. 1-11). Prior to trial, Diaz filed a motion to dismiss the information filed against him, alleging a due process violation and entrapment as a matter of law. (R. 23-36). Francisco and Jose joined in the motion at a later date. (T. 9).

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Based upon the testimony presented at the hearing on the foregoing motions, the trial court reduced all counts relating to the use of a firearm from armed to unarmed. (T. 121-122). The court also dismissed all charges because of the objective entrapment test set forth in Cruz v. State, 465 So.2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985). (T. 121-122). Ten days later, the trial court informed the parties that the charges would be dismissed because of the due process arguments proffered by the defendants and stated that "although the Third District has ruled there is no longer an entrapment test," the facts justified dismissal order to objective entrapment test. (T. 131-132).

On appeal, the state challenged the dismissal of the charges, arguing that use of a confidential informant violates due process considerations only where the informant must testify at trial and will benefit from his trial testimony and the successful prosecution of a defendant. (Initial Brief 10-17). The State also challenged the trial court's finding that the charges should be dismissed because of the objective entrapment test and the possibility that dismissal was based upon the objective entrapment test. (Initial Brief 18-19).

2. In affirming the dismissal of the charges against Diaz, this Honorable Court relies on the objective entrapment test enunciated in Cruz v. State. This Court further relies on

its decision in Lewis v. State, 17 FLW D793, 794 n.1 (Fla. 3d DCA March 24, 1992). (Slip Op. 5). Appellant submits that this reliance is misplaced.

3. Section 777.201(2) of the Florida Statutes expressly states that the "issue of entrapment shall be tried by the trier of fact." This Honorable Court has held that the defense of objective entrapment had been abolished by §777.201. See Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990), review denied, 584 So.2d 998 (Fla. 1991); State v. Lopez, 522 So.2d 537 (Fla. 3d DCA 1988). However, following the decisions in State v. Hunter, 586 So.2d 319 (1991) and State v. Krajewski, 589 So.2d 254 (Fla. 1991), this Court issued its opinion in Lewis v. State, applying the objective entrapment test to the facts presented in Lewis. In so doing, this Court recognized the line of cases holding that the objective entrapment test had been abolished by §777.201, but chose to rely on Hunter and Krajewski. 17 FLW at D794 n.1.

As noted by Chief Judge Schwartz in his specially concurring opinion in Lewis, the court in Hunter did not even cite §777.201. Appellant submits that the court in Hunter had no reason to discuss §777.201 since the statute was not in effect when Hunter and Conklin were charged and therefore, could not have been in effect when the crimes were committed. Section 777.201 went into effect on October 1, 1987. Ch. 87-243, §42,

Laws of Fla. Because the Fourth District Court of Appeal's opinion in Hunter v. State, reflects 1986 appellate court case numbers 4-86-0807 and 4-86-0808, the appeals in Hunter were originally filed in 1986 and the crimes clearly were committed before October 1, 1987. See Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988)(see title page reflecting appellate case numbers). Any application of §777.201 to the offenses in Hunter would violate ex post facto considerations. Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). Section 777.201 does, however, apply to the instant case because Appellant was charged in 1990 - well after the statute went into effect.

5. State v. Krajewski is also inapplicable to the facts of the instant case. When presented with the issue of objective entrapment in Krajewski, the Fourth District Court of Appeal agreed with prior Third District Court rulings and held that the defense of objective entrapment had been abolished by §777.201. Krajewski v. State, 587 So.2d 1175, 1177-78 (Fla. 4th DCA 1991).[1] After finding that the objective entrapment defense had been abolished by §777.201, the Fourth District addressed State v. Glosson and due process criteria and found that Krajewski's due process rights had been violated. 587 So.2d at 1183-84. The

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[1] This ruling was not altered or rejected by the Supreme Court in Krajewski v. State, 589 So.2d 254 (Fla. 1991). However, like the court in the instant, the Fourth District has receded from this position and recently ruled that State v. Hunter revives the objective entrapment test despite §777.201. See Ricardo v. State, 17 FLW D1 (Fla. 4th DCA January 3, 1992); Strickland v. State, 16 FLW D2671 (Fla. 4th DCA October 25, 1991).

Fourth District then certified to the Supreme Court the limited question of whether the facts of Krajewski violated State v. Glosson, 587 So.2d at 1184. The Supreme Court answered the certified question in the negative, indicating that there was no due process or Glosson violation. 589 So.2d at 255. The Supreme Court in Krajewski did not address Cruz v. State, 465 So.2d 516 (Fla. 1985), or the issue of objective entrapment because the certified question dealt solely with Glosson and due process considerations. 589 So.2d at 254.

6. Based upon the foregoing, it is extremely clear that neither Hunter nor Krajewski mandate the application of the objective entrapment test to the facts of the instant case.

7. As Chief Judge Schwartz points out in his concurring opinion, in Lewis the Supreme Court in State v. Hunter neither expressly overrules §777.201, nor holds the statute to be unconstitutional. 17 FLW at 794-795. In fact, in Herrera v. State, 17 FLW S84 (Fla. February 7, 1992), the Supreme Court was asked to consider whether §777.201 impermissibly shifted the burden of proof from the prosecution to the defense. Implicit in the Supreme Court's ruling that the statute did not unconstitutionally shift the burden to the defense, was a ruling that the statute was otherwise constitutionality sound. However, because the objective entrapment defense could not applied to the facts of Herrera, the issue of whether the objective entrapment

defense remained viable in light of §777.201 was not reached. 17 FLW at S85. (Justice Kogan concurring).

8. Because the Supreme Court has not yet addressed the viability of the objective entrapment defense in light of §777.201, Appellant respectfully requests that this Honorable Court grant rehearing to reconsider the instant case in light of its previous decisions in Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990), review denied, 584 So.2d 998 (Fla. 1991), and State v. Lopez, 522 So.2d 537 (Fla. 3d DCA 1988).

9. Appellant also respectfully requests that the following question be certified to the Florida Supreme Court as a question of great public importance:

> HAS THE OBJECTIVE ENTRAPMENT TEST SET FORTH IN CRUZ V. STATE, 465 SO.2D 516 (FLA. 1985), CERT. DENIED, 473 U.S. 905 (1985), BEEN ABOLISHED BY THE ENACTMENT OF SECTION 777.201, FLORIDA STATUTES (1987)?

This question has been certified to the Florida Supreme Court by the First District Court of Appeal in State v. Thinh Thien Pham, 17 FLW D607 (Fla. 1st DCA March 2, 1992) and Simmons v. State, 16 FLW D3092 (Fla. 1st DCA December 13, 1991).[2]

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2 Undersigned counsel has been informed that the Supreme Court has accepted jurisdiction in Simmons.

10. Assuming, for the sake of argument only, that the foregoing analysis is unpersuasive and that State v. Hunter does in fact revive the objective entrapment defense despite §777.201, Appellant submits that the instant cause should be remanded to the trial court without direction to discharge so that the State may present evidence to rebut the claim of objective entrapment. See Clemons v. State, 533 So.2d 321 (Fla. 5th DCA 1988)(remand necessary to determine whether defendant's car would have been routinely stopped for a traffic infraction absent drug suspicions of police officers where testimony in this regard was neither credited nor discredited and issue not reached by trial court); Sanchez v. State, 516 So.2d 1061 (Fla. 3d DCA 1987)(correctness of trial court's ruling on suppression motion turned on resolution of conflict between testimony of two officers necessitating relinquishment of jurisdiction to trial court for entry of findings of fact and conclusions of law); Adams v. State, 417 So.2d 826 (Fla. 1st DCA 1982)(where defendant's motion for new trial raised issue that verdict was contrary to weight of evidence but order denying motion was worded so as to indicate that trial court may have limited itself to sufficiency of evidence standard, remand was necessary to allow trial court to state whether its ruling was on weight of evidence as well as sufficiency). See also United States v. Torres, 720 F.2d 1506 (11th Cir. 1983)(failure to make sufficient findings of fact to enable panel to properly review conclusion of law requires remand for clarification by trial court); United States v. Kastenbaum,

613 F.2d 86 (5th Cir. 1980)(case may be remanded if the trial court has made no findings or insufficient findings).

11. Because, as was discussed above, State v. Hunter and State v. Krajewski do not apply to the facts in the instant case and the Florida Supreme Court has not expressly ruled that the objective entrapment defense survives §777.201, undersigned counsel respectfully requests rehearing en banc pursuant to Fla.R.App.P. 9.331 and certifies:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court: Gonzalez v. State, 571 So.2d 1346 (Fla. 3d DCA 1990), Gonzalez v. State, 525 So.2d 1005 (Fla. 3d DCA 1988), and State v. Lopez, 522 So.2d 537 (Fla. 3d DCA 1988).

12. Pursuant to Fla.R.App.P. 9.331 undersigned counsel further certifies:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

WHEREFORE, based upon the foregoing reasons and authorities cited herein, Appellant requests rehearing or rehearing en banc. Appellant further requests that this Honorable Court certify the question presented above as a question of great public importance.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION FOR REHEARING AND MOTION FOR REHEARING EN BANC was furnished by mail to GERARDO REMY, Attorney for Lazaro Diaz, 3400 Coral Way, Suite 501, Miami, Florida 33145, and HARVEY SEPLER, Attorney for Francisco and Jose Ramos, Assistant Public Defender, 1351 Northwest 12th Street, Miami, Florida 33125, on this 31st day of August, 1992.

ANGELICA D. ZAYAS
Assistant Attorney General

/blm

91-131564-K

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1992

DECEMBER 22, 1992

THE STATE OF FLORIDA, **

Appellant, **

vs. ** CASE NO. 91-470

FRANCISCO RAMOS, et al., **

Appellees. **

Upon consideration, appellant's motion to accept motions for rehearing and rehearing en banc as timely filed is hereby granted. Appellant's motions for rehearing, rehearing en banc and motion to stay mandate pending review are denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By _____
Deputy Clerk

cc: Angelica D. Zayas
Gerardo Andres Remy, Jr.

Harvey Sepler

/nbc

equal to the amount demanded in such claim of lien, plus interest thereon at the legal rate for 3 years, plus $500 to apply on any court costs which may be taxed in any proceeding to enforce said lien.

[redacted] § 627.756, Fla. Stat. (1987).

[redacted] § 627.736(8), Fla. Stat. (1987).

* * *

Criminal law—Entrapment—Statute which allocates to defendant the burden of proving entrapment defense is not unconstitutional—Defendant not deprived of due process by jury instruction shifting burden of proving entrapment to defense

ORLANDO HERRERA, Petitioner, v. STATE OF FLORIDA, Respondent. Supreme Court of Florida. Case No. 78,290. February 6, 1992. Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. Fourth District - Case No. 90-00583 (Palm Beach County). Richard L. Jorandby, Public Defender and Allen J. DeWeese, Assistant Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida, for Petitioner. Robert A. Butterworth, Attorney General; Joan Fowler, Bureau Chief, Senior Assistant Attorney General and Douglas J. Glaid, Assistant Attorney General, West Palm Beach, Florida, for Respondent.

(McDONALD, J.) In *Herrera v. State*, 580 So.2d 653, 654 (Fla. 4th DCA 1991), the district court certified the following question as being of great public importance:

> Do Instruction 3.04(c)(2), Florida Standard Jury Instructions in Criminal Cases, and Section 777.201(2), Florida Statutes (1989), both applicable to offenses after 1987, unconstitutionally shift the burden to the defense to prove entrapment?

We have jurisdiction pursuant to article V, section 3(b)(4), Florida Constitution, answer the question in the negative, and approve *Herrera*.

The State charged Herrera with trafficking in cocaine, conspiracy to traffic in cocaine, and obstructing an officer without violence. These charges resulted from a sting operation initiated by a confidential informant, and Herrera raised entrapment as an affirmative defense. Herrera asked the trial court to give the jury the former standard instruction on entrapment, the last paragraph of which stated: "On the issue of entrapment, the State must convince you beyond a reasonable doubt that the defendant was not entrapped." Instead, the court gave the jury the current standard instruction on entrapment, the final paragraph of which reads: "On the issue of entrapment, the defendant must prove to you by a preponderance of the evidence that his criminal conduct occurred as the result of entrapment." The jury convicted Herrera of the trafficking and obstruction charges, for which the trial court imposed consecutive fifteen and one-year sentences, respectively. The district court affirmed the convictions, but remanded for resentencing, and certified the question set out above.

The new paragraph in the entrapment instruction is based on section 777.201, Florida Statutes (1989), which reads as follows:

> (1) A law enforcement officer, a person engaged in cooperation with a law enforcement officer, or a person acting as an agent of a law enforcement officer perpetrates an entrapment if, for the purpose of obtaining evidence of the commission of a crime, he induces or encourages and, as a direct result, causes another person to engage in conduct constituting such crime by employing methods of persuasion or inducement which create a substantial risk that such crime will be committed by a person other than one who is ready to commit it.
>
> (2) A person prosecuted for a crime shall be acquitted if he proves by a preponderance of the evidence that his criminal conduct occurred as a result of an entrapment. The issue of entrapment shall be tried by the trier of fact.

This section is derived from chapter 87-243, section 42, Laws of Florida, and codifies, for the first time, a general entrapment defense. This Court approved the new instruction for use in Florida trial courts, but noted the instructions committee's concern over the constitutionality of the legislation and this Court's refusal to consider such an issue in nonadversarial proceedings. *In re Standard Jury Instructions in Criminal Cases*, 543 So.2d 1205 (Fla. 1989). The instant case squarely presents the issue for our resolution.

Herrera argues that this Court's decisions on previous versions of the entrapment instruction, *e.g.*, *State v. Wheeler*, 468 So.2d 978 (Fla. 1985), demonstrate that the new instruction and subsection 777.201(2) violate the due process clauses of the United States and Florida Constitutions. The State, on the other hand, contends that the instruction and statute are constitutional because they shift only the burden of persuasion of an affirmative defense, not the burden of proving the elements of the crime charged and the defendant's guilt. The two district courts that have considered this issue have agreed with the State. *E.g.*, *Krajewski v. State*, 587 So.2d 1175 (Fla. 4th DCA 1991);[2] *Gonzalez v. State*, 571 So.2d 1346 (Fla. 3d DCA 1990), *review denied*, 584 So.2d 998 (Fla. 1991). We do likewise.

Entrapment is a judicially created[3] affirmative defense designed to prevent the government from contending a defendant "is guilty of a crime where the government officials are the instigators of his conduct." *Sorrells v. United States*, 287 U.S. 435, 452 (1932).[4] To this end, "[t]he predisposition and criminal design of the defendant are relevant." *Id.* at 451. If the defendant "is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials . . . . common justice requires that the accused be permitted to prove it." *Id.* Thus, we have defined the "essential element of the defense of entrapment" as "the absence of a predisposition of the defendant to commit the offense." *State v. Dickinson*, 370 So.2d 762, 763 (Fla. 1979). Subsection 777.201(1) now provides that lack of predisposition is an element of the defense.

Over the years Florida courts have gone back and forth on which side must produce evidence regarding the defendant's having been entrapped.[5] Some cases hold that defendants must show entrapment by proving their lack of predisposition toward criminal activity. *E.g.*, *Priestly v. State*, 450 So.2d 289 (Fla. 4th DCA 1984); *Evenson v. State*, 277 So.2d 587 (Fla. 4th DCA 1973); *Koptyra v. State*, 172 So.2d 628 (Fla. 2d DCA 1965). Other cases have held that the State must disprove entrapment by showing the defendant's predisposition to commit the offense. *E.g.*, *Wheeler*; *Moody v. State*, 359 So.2d 557 (Fla. 4th DCA 1978). Subsection 777.201(2) evidences the legislature's intent that the defendant should prove entrapment instead of requiring the State to disprove it.

Entrapment is an affirmative defense and, as such, is in the nature of an avoidance of the charges.[6] *Evenson*. As this Court has previously stated: "An 'affirmative defense' is any defense that assumes the complaint or charges to be correct but raises other facts that, if true, would establish a valid excuse or justification or a right to engage in the conduct in question." *State v. Cohen*, 568 So.2d 49, 51 (Fla. 1990). In considering affirmative defenses the United States Supreme Court has held that "it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (citations omitted). The burden of proving the elements of a crime cannot be shifted to a defendant. *E.g.*, *Sandstrom v. Montana*, 442 U.S. 510 (1979). If "a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged," however, "a defendant's constitutional rights are not violated." *Walton v. Arizona*, 110 S.Ct. 3047, 3055 (1990). Earlier Florida cases recognized the principles set out in these more recent Supreme Court cases. *E.g.*, *Koptyra*, 172 So.2d at 632 ("While the state always has the burden of proving the guilt of accused beyond a reasonable doubt and the accused never has the burden of proving his innocence, nevertheless, the burden of adducing evidence on

the defense of entrapment is on the accused unless the facts relied on otherwise appear in evidence to such an extent as to raise in the minds of the jury a reasonable doubt of guilt.")

For the first time the State, through the legislature, has decided that the burden is on defendants claiming entrapment to prove they were entrapped. § 777.201(2). We hold that allocating this burden to a defendant is not unconstitutional. *Cf. Patterson*, 432 U.S. at 210 (the Court refused "to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of the accused" because "[p]roof of the nonexistence of all affirmative defenses has never been constitutionally required.")

As stated earlier, the lack of predisposition to commit the crime charged is an essential element of the defense of entrapment. The predisposition to commit a crime, however, is not the same as the intent to commit that crime. As explained by the New Jersey Supreme Court in its consideration of this issue, "predisposition is not the same as *mens rea*. The former involves the defendant's character and criminal inclinations; the latter involves the defendant's state of mind while carrying out the allegedly criminal act." *State v. Rockholt*, 476 A.2d 1236, 1242 (N.J. 1984). Requiring a defendant to show lack of predisposition does not relieve the State of its burden to prove that the defendant committed the crime charged. The standard instructions require the State to prove beyond a reasonable doubt all the elements of the crime, and we find no violation of due process in requiring defendants to bear the burden of persuading their juries that they were entrapped.

Therefore, we answer the certified question in the negative and approve the district court's decision in *Herrera*.[7]

It is so ordered. (SHAW, C.J. and OVERTON, GRIMES and HARDING, JJ., concur. KOGAN, J., concurs in result only with an opinion, in which BARKETT, J., concurs.)

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[1]Prior to enacting chapter 87-243, Laws of Florida, the legislature had done little regarding entrapment. In 1977 the legislature codified the affirmative defense of entrapment for violations of the Florida Anti-Fencing Act, sections 812.012 through 812.037. § 812.028(4), Fla. Stat. (1977). This Court found that act, including its codification of entrapment, constitutional in State v. Dickinson, 370 So.2d 762 (Fla. 1979). Before the enactment of subsection 812.028(4), the legislature had also addressed entrapment by abolishing its use in bribery prosecutions. § 838.11, Fla. Stat. (1957). Section 838.11, however, has been repealed. Ch. 59-234, § 1, Laws of Fla.

[2]In Krajewski v. State, 587 So.2d 1175 (Fla 4th DCA 1991), the district court certified the same question that we answered in State v. Hunter, 586 So.2d 319 (Fla. 1991), and, in reviewing *Krajewski*, we answered that question and did not consider the issue presented in the instant case. State v. Krajewski, No. 77,685 (Fla. Oct. 17, 1991).

[3]1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.2(a) (1986).

[4]The United States Supreme Court first recognized and applied the entrapment defense in Sorrells v. United States, 287 U.S. 435 (1932). United States v. Russell, 411 U.S. 423 (1973). This Court recognized the defense shortly afterwards. *E.g.*, Hall v. State, 144 Fla. 333, 198 So. 60 (1940).

[5]At least 40 jurisdictions have considered which side should bear the burden regarding entrapment, with slightly more than half placing it on the defendant. John H. Derrick, Annotation, *Burden of Proof as to Entrapment Defense—State Cases*, 52 A.L.R. 4th 775 (1987).

[6]An affirmative defense generally concedes the elements of an offense. State v. Cohen, 568 So.2d 49 (Fla. 1990). Regarding the affirmative defense of entrapment, however, we have held that "a request for an instruction on entrapment when there is evidence to support the defense should be refused only if the defendant has denied under oath the acts constituting the crime that is charged." Wilson v. State, 577 So.2d 1300, 1302 (Fla. 1991). *See* Mathews v. United States, 485 U.S. 58 (1988).

[7]We decline to address the second issue raised by Herrera.

(KOGAN, J., concurring in result only.) While I have no quarrel with the result reached by the majority in construing section 777.201, Florida Statutes (1989), I write separately to stress that the majority is concerned exclusively with the "subjective" form of entrapment. Although the majority does not note the fact, a second constitutionally-based form of entrapment exists in Florida. This second form is "objective" entrapment, which we recognized as a matter of state law in *Cruz v. State*, 465 So.2d 516, 520-21 (Fla.), *cert. denied*, 473 U.S. 905 (1985). *Accord State v. Glosson*, 462 So.2d 1082 (Fla. 1985).

Although no similar defense exists in the federal system, Justice McDonald's majority opinion in *State v. Hunter*, 586 So.2d 319, 322 (Fla. 1991), expressly recognized that "this objective entrapment standard includes due process considerations." The majority does not discuss the objective-entrapment analysis developed by *Cruz*, *Glosson*, and *Hunter*, and it thus is obvious that the majority has not attempted to address the exact nature of the burdens of proof under an objective entrapment defense.

I am somewhat surprised by the majority's failure even to mention objective entrapment. In the recent case of *Traylor v. State*, No. 70,051 (Fla. Jan. 16, 1992) [17 F.L.W. S42], Chief Justice Shaw joined in relevant part by five other members of this Court recognized the existence of the doctrine of primacy. Under primacy, state courts are required to give first consideration to state constitutional issues, and only to address analogous federal questions if no violation of the state Constitution is found.

In the present case, the majority fails even to make a perfunctory gesture at honoring its own recently announced doctrine of primacy. This is especially troubling, since petitioner raised state constitutional issues in his brief and expressly argued that his entrapment defense was based on article I, section 9 of the Florida Constitution. Certainly when state issues are properly raised and briefed, this Court has a duty and an obligation to honor its own doctrine of primacy.

I do not quarrel with the result reached by the majority only because I agree with its implicit holding that objective entrapment was not a defense available to this petitioner based on the facts at hand. In discussing objective entrapment, we previously have stated that it is not a permissible defense

> where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity.

Cruz, 465 So.2d at 522. The emphasis of objective entrapment is on forbidding the state from prosecuting "crime" that never would have existed but for police activity engendering the offense or police conduct that otherwise overstepped the standards of permissible governmental conduct. *Id.* at 521. Here, I cannot agree that the crime for which petitioner was convicted was manufactured by police or was otherwise improper. The use of subterfuge is subject to definite due process limitations even in cases involving criminally predisposed defendants; but I do not agree that the limits were crossed here. This was a routine and rather unremarkable sting operation. Thus, the only possible defense available to petitioner was subjective entrapment.

On this last question, I agree with the majority that section 777.201 meets the minimum standards of the state and federal constitutions. In Florida, an affirmative defense does not concern itself with the elements of the crime, but essentially concedes them. *State v. Cohen*, 568 So.2d 49 (Fla. 1990). Thus, the due process requirement of proof beyond a reasonable doubt is not violated if a defendant must prove subjective entrapment by a preponderance of the evidence, as section 777.201 requires, because the State is not being relieved of its burden of proof. The statute therefore is valid, although this holding necessarily is limited solely to the statute's application to subjective entrapment. In this sense, the majority is recognizing that the relevant portion of our opinion in *State v. Wheeler*, 468 So.2d 978 (Fla. 1985), has been legislatively overruled by section 777.201 as *Wheeler* is applied to subjective entrapment.

This does not necessarily mean, however, that the same conclusions would apply to the defense of *objective* entrapment. As *Cruz* and *Hunter* held, objective entrapment by its very nature raises distinct due process questions. *See Cruz*, 465 So.2d at 521-

22. Some of the preliminary considerations about objective entrapment are questions of law that must be decided by the trial court, not the jury—a situation that is quite different from subjective entrapment. Moreover, we have recognized that the state bears a significant burden of proof with regard to this legal question. *Id.* at 520-22. Accordingly, the question of the burdens of proof applicable to objective entrapment is a far more serious issue of Florida constitutional law, and one that the majority does not address or modify today. That is as it should be, since this is not an objective entrapment case. (BARKETT, J., concurs.)

* * *

Mechanic's lien—Where property owner and contractor share a common identity, privity may be established between a subcontractor and the owner so as to excuse the notice to owner requirement for perfecting mechanic's lien—Common identity is established between contractor and owner where party who is president and sole shareholder of contractor is also president and sole shareholder of the company that is the managing partner of the joint venture which owns the property under construction—Privity exists either when the owner knows a subcontractor is working on the job and that owner has assumed the contractual obligation for the work or when the owner and contractor share a common identity—Attorney's fees awardable against surety on lien-transfer bond are not limited to $500—Surety's liability may not be increased beyond face amount of bond in order to cover costs—Any part of lien-transfer bond not included in foreclosure judgment can be awarded for costs, but lienor is left with an unsecured judgment against the owner for any costs which exceed the remaining face amount of the bond

AETNA CASUALTY AND SURETY COMPANY, etc., et al., Petitioners, v. GORDON F. BUCK, P.E., etc., Respondent. Supreme Court of Florida. Case No. 76,925. February 6, 1992. Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions. Fourth District - Case No. 90-2906 (Palm Beach County). John M. Jorgensen of Scott, Royce, Harris, [redacted] & Hyland, P.A., Palm Beach Gardens, Florida, for Petitioners. Isidro M. Garcia of Joseph A. Vassallo, P.A., Lake Worth, Florida, for Respondent.

(HARDING, J.) We have for review *Pappalardo Construction Co. v. Buck*, 568 So.2d 507 (Fla. 4th DCA 1990), in which the district court acknowledged conflict with *Floridaire Mechanical Systems, Inc. v. Alfred S. Austin-Daper Tampa, Inc.*, 470 So.2d 717 (Fla. 2d DCA), *review denied*, 480 So.2d 1293 (Fla. 1985), on the issue of whether privity should be found where an owner and contractor share a common identity so as to excuse the notice-to-owner requirement for perfecting a mechanics' lien. We have jurisdiction pursuant to article V, section 3(b)(4), Florida Constitution.

Vincent J. Pappalardo (Pappalardo) is the president and sole shareholder of Pappalardo Construction Company (Pappalardo Construction) and the president and sole shareholder of Bay Colony Land Company (Bay Colony Land). Pappalardo Construction is the general contractor on the construction site known as Bay Colony. Bay Colony Land is one of the two partners in the joint venture which owns the property under construction. Gordon F. Buck (Buck) orally contracted with Pappalardo Construction to furnish metal construction materials to the construction site. The parties disputed the reasonableness of the delivery time and Pappalardo Construction subsequently withheld payment for the materials. Buck filed a claim of lien against Pappalardo. Pappalardo transferred the lien to a surety bond issued by Aetna Casualty and Surety Company (Aetna). Buck never served a notice of lien on the joint venture as owner of the property.

The trial court held that because the owner and general contractor shared a common identity, the owner's knowledge of the subcontractor's presence on the job, obtained through his actions as the general contractor, established privity of contract between the owner and subcontractor. The trial court granted attorney's fees against Aetna and ordered an increase in the bond amount to cover these fees. On appeal, the district court agreed with the trial court's definition of privity and affirmed the trial court's final judgment and order.

I.

Mechanics' liens are "purely creatures of the statute." *Sh[redacted]field-Briggs Steel Prods., Inc. v. Ace Concrete Serv. Co.*, [redacted] So.2d 924, 925 (Fla. 1953). As a statutory creature, the mechanics' lien law must be strictly construed. *Home Elec. of Dade County, Inc. v. Gonas*, 547 So.2d 109, 111 (Fla. 1989). As a prerequisite to perfecting a mechanics' lien, all lienors who are not in privity with the owner, except for laborers, must serve a notice on the owner. § 713.06(2), Fla. Stat. (1987). The purpose of serving notice to an owner is " 'to protect an owner from the possibility of paying over to his contractor sums which ought to go to a subcontractor who remains unpaid.' " *Broward Atlantic Plumbing Co. v. R.L.P., Inc.*, 402 So.2d 464, 466 (Fla. 4th DCA 1981) (quoting *Boux v. East Hillsborough Apartments, Inc.*, 218 So.2d 202, 202 (Fla. 2d DCA 1969)). In other words, as the trial court recognized, the notice requirement is just that, a notice to the owner that those not in privity with the owner are in fact providing improvements to the property. Because the purpose of serving notice is to alert the owner to guard against double payment, such notice will be excused only when privity exists between the owner and the subcontractor. *See* § 713.05, Fla. Stat. (1987).[1] Privity, however, is not defined in the statute. *Tompkins Land Co. v. Edge*, 341 So.2d 206, 207 (Fla. 4th DCA 1976).

In *Harper Lumber & Manufacturing Co. v. Teate*, 98 Fla. 1055, 125 So. 21 (1929), this Court held that privity requires both knowledge by an owner that a particular subcontractor is supplying services or materials to the job site and an express or implied assumption by the owner of the contractual obligation to pay for those services or materials. *Id.; see also First Nat'l Bank of Tampa v. Southern Lumber & Supply Co.*, 106 Fla. 821, 145 So. 594 (1932). The Second District Court applied this definition of privity in *Floridaire*, and the petitioners contend that it should be applied in the instant case.

Although we agree with the *Harper Lumber* and *Floridaire* definitions of privity, we also hold that privity is established where, for all practical purposes, a common identity exists between the owner and the contractor. *Cf. Broward Atlantic Plumbing Co. v. R.L.P., Inc.*, 402 So.2d 464, 466 (Fla. 4th DCA 1981) (the three owners of a real estate project were also the principals in the contracting corporation). In such a case, service of notice on the owner is not necessary in order to perfect a mechanics' lien. Thus, we find that privity exists either when the owner knows a subcontractor is working on the job and that owner has assumed the contractual obligation for the work or when the owner and contractor share a common identity. In either situation, notice is not required.

In the instant case, the trial court made a factual determination that the owner and the contractor share a common identity. The record more than adequately supports the trial court's finding of this common identity. Here, the warranty deed and the Notice of Commencement both list the address of the owner as "c/o Vincent J. Pappalardo, 4440 PGA Blvd., Palm Beach Gardens, Florida." The construction contract between the joint venture and Pappalardo Construction lists the address of the owner and of the contractor as "4440 PGA Blvd., Palm Beach Gardens, Florida." Furthermore, the construction contract itself lists Bay Colony Land, of which Pappalardo is 100% owner, as the managing partner of the joint venture. Pappalardo signed the construction contract both in his capacity as president of Bay Colony Land, which is listed as the owner, and in his capacity as president of Pappalardo Construction. Pappalardo personally approved the subcontract between Pappalardo Construction and Buck. Pappalardo also acknowledged that he was on the job site once or twice a day in his capacity as general contractor and as the agent for the owner. In addition, the project manager for Pappalardo Construction, Palermo, believed that Pappalardo was the owner and, upon inquiry by Buck, informed Buck of such. Thus, even if Buck had actually given notice to the owner,

No. 91-584. Opinion filed March 2, 1992. Appeal from an order of the Judge of Compensation Claims, Elwyn M. Akins. Jonathan D. Ohlman and John E. Dawson of Pattillo & McKeever, P.A., Ocala, for appellant. Mark A. Massey of the Law Office of Daniel L. Hightower, P.A., Ocala, for appellees.

(PER CURIAM.) Appellant appeals from a final order of the judge of compensation claims (JCC) raising a number of issues, only two of which need to be addressed: (1) Whether the JCC erred in denying a claim for medical mileage reimbursement, and (2) whether the JCC erred in denying a claim for penalties and interest. The employer/carrier conceded at oral argument that the case should be remanded for a determination of the claimant's entitlement to penalties and interest, and we find that there was no basis for denying reimbursement for medical mileage prior to the date of maximum medical improvement. We reverse and remand on these issues, but affirm the order of the JCC in all other respects. (BOOTH, WOLF and KAHN, JJ., concur.)

* * *

Criminal law—Entrapment—Question certified whether the objective entrapment test set forth in *Cruz v. State*, 465 So.2d 516 (Fla. 1985), *cert. denied*, 473 U.S. 905 (1985), has been abolished by the enactment of Section 777.201, Florida Statutes (1987)

STATE OF FLORIDA, Appellant, v. THINH THIEN PHAM AND HANG THI VU, Appellees. 1st District. Case Nos. 91-2 and 91-3 (consolidated). Opinion filed March 2, 1992. An Appeal from the Circuit Court for Bay County, Don T. Sirmons, Judge. Robert A. Butterworth, Attorney General, Gypsy Bailey, Assistant Attorney General and Wendy Morris, Legal Intern, Tallahassee, for Appellant. Alvin L. Peters of McCauley & Peters, Panama City, for Appellees.

ON MOTION FOR REHEARING
[Original Opinion at 17 F.L.W. D271]

(JOANOS, Chief Judge.) Appellees seek rehearing of our decision in which we reversed the trial court's order dismissing the informations filed against them. Our decision in this case was based upon this court's prior decision in *State v. Munoz*, 586 So.2d 515 (Fla. 1st DCA 1991), in which the identical issue presented in this case was decided adversely to appellees' interests. In *Munoz*, a prior panel of this court held that section 777.201, Florida Statutes (1987), effectively abolished the objective entrapment test articulated in *Cruz v. State*, 465 So.2d 516 (Fla.), *cert. denied*, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985). We are constrained to follow this court's prior decisions. Therefore, the motion for rehearing is denied.

However, we recognize the uncertainty among the district courts of appeal concerning the continuing viability of the objective entrapment test following enactment of section 777.201, Florida Statutes (1987), and the supreme court's discussion of objective entrapment in the context of a due process analysis in *State v. Hunter*, 586 So.2d 319 (Fla. 1991). Justice Kogan's concurrence in *Herrera v. State*, __So.2d __, 17 F.L.W. S84 (Fla. Feb. 6, 1992), also emphasizes the need for further enlightenment on this issue by the Florida Supreme Court. Accordingly, we certify the question previously certified on rehearing in *Simmons v. State*, 16 F.L.W. D3092 (Fla. 1st DCA Dec. 13, 1991), as a question of great public importance:

> HAS THE OBJECTIVE ENTRAPMENT TEST SET FORTH IN *CRUZ V. STATE*, 465 SO.2D 516 (FLA. 1985); *CERT. DENIED*, 473 U.S. 905 (1985), BEEN ABOLISHED BY THE ENACTMENT OF SECTION 777.201, FLORIDA STATUTES (1987)?

In all other respects, appellees' motion for rehearing is denied. (ERVIN, J., and WENTWORTH, S.J., CONCUR.)

* * *

Civil procedure—Costs—Voluntarily dismissed action—Where supreme court remanded case only because it could not tell from record whether trial court had used proper analysis in connection with judgment for costs, trial court complied with mandate by meeting with counsel and stating that the analysis articulated by the supreme court was the analysis he had used in entering the original judgment—Once trial court clarified that he had used proper analysis, no further action was required

COASTAL PETROLEUM COMPANY, Petitioner, vs. MOBIL OIL CORPORATION, Respondent. 1st District. Case No. 91-3034. Opinion filed March 2, 1992. Petition for Writ of Certiorari. Robert J. Angerer, Tallahassee, for Petitioner. Michael Rosen, Julian Clarkson and Robert Feagin, III, of Holland & Knight, Tallahassee, for Respondent.

(ALLEN, J.) This is the second petition for writ of certiorari Coastal Petroleum Company (Coastal) has filed with this court in connection with a judgment for costs entered in 1987, following Coastal's voluntary dismissal of claims against Mobil Oil Corporation. Our opinion in response to the earlier petition, *Coastal Petroleum Co. v. Mobil Oil Corp.*, 550 So.2d 158 (Fla. 1st DCA 1989), was followed by the supreme court's opinion upon review, *Coastal Petroleum Co. v. Mobil Oil Corp.*, 583 So.2d 1022 (Fla. 1991). Coastal contends that, upon remand, the trial court failed to comply with the decision of the supreme court. Concluding that the trial court's actions were consistent with the supreme court's decision, we deny the petition.

The supreme court opinion explained the analysis to be used by a trial court in deciding a motion for award of trial preparation costs following voluntary dismissal of an action. Because the supreme court could not determine from the record whether the trial court had used the proper analysis, it remanded the cause for reconsideration in light of its opinion and directed the trial court to conduct a hearing on the request for costs, applying the analysis developed in the opinion.

Upon remand, the trial judge met with counsel for the parties and stated that the analysis articulated by the supreme court was the analysis he had used in entering the 1987 judgment for costs. Because he had employed the proper analysis when reviewing the evidence presented at the 1987 hearing, he denied Coastal's request for a second evidentiary hearing. The judge's subsequent order reaffirmed the 1987 costs judgment, explained again that the analysis required by the supreme court had been used at the original costs hearing, declared that the reasonableness and necessity of the costs awarded had been determined before entering the judgment, and concluded that there was no need to hold a second evidentiary hearing or disturb his previous findings.

We believe the trial court's actions on remand complied with the supreme court's directive. Remand following the supreme court opinion was necessary only because the record before the supreme court did not reveal whether the trial court had used the proper analysis. Once the trial court clarified the record deficiency by indicating that the proper analysis had been used, there was no need for further action by the trial court. Like the trial court, we do not understand the supreme court opinion to require a second evidentiary hearing under these circumstances. *See Avis Rent-A-Car Sys., Inc, v. Abrahantes*, 559 So.2d 1262 (Fla. 3d DCA 1990); and *Buchanan v. Golden Hills Turf & Country Club, Inc.*, 308 So.2d 168 (Fla. 1st DCA 1975).

Coastal has failed to show that the trial court departed from the essential requirements of law. Accordingly, the petition for writ of certiorari is denied. (KAHN, J., CONCURS; WEBSTER, J., DISSENTS WITH WRITTEN OPINION.)

(WEBSTER, J., dissenting.) My reading of *Coastal Petroleum Co. v. Mobil Oil Corp.*, 583 So.2d 1022 (Fla. 1991), leads me to conclude that the Supreme Court intended thereby to establish, for the first time in Florida, a rule delineating what expenses (including those attributable to experts) may be assessed as "costs," pursuant to Rule 1.420(d), Florida Rules of Civil Procedure, against a party who takes a voluntary dismissal before trial. My reading of that opinion leads me to conclude, further, that the Supreme Court believed that, by its decision, it was altering the common law of Florida.

The final paragraph of the Supreme Court's opinion reads as follows:

[redacted]

App. 5

Maria KANE, as Personal Representative of the Estate of Alfred B. Kane, Appellant,

v.

Marilyn LORD, Michelle Lord, Ellen Lord, and Debra Lord Hirsh, Appellees.

No. 91-848.

District Court of Appeal of Florida, Third District.

Sept. 24, 1991.

On Motion for Rehearing Dec. 31, 1991.

An Appeal from the Circuit Court for Dade County; Harold G. Featherstone, Judge.

Tescher, Chaves & Hochman and Donald R. Tescher, Miami, for appellant.

Peter M. MacNamara, Miami, for appellees.

Before NESBITT, BASKIN and GODERICH, JJ.

PER CURIAM.

Affirmed. *See Spohr v. Berryman*, 564 So.2d 241 (Fla. 4th DCA 1990); *Scutieri v. Estate of Revitz*, 510 So.2d 1003 (Fla. 3d DCA 1987), *review denied*, 519 So.2d 986 (Fla.1988); *Harbour House Properties, Inc. v. Estate of Stone*, 443 So.2d 136 (Fla. 3d DCA 1983).

ON MOTION FOR REHEARING

PER CURIAM.

We grant appellant's motion for rehearing and reverse the order under review based on the authority of *Spohr v. Berryman*, 589 So.2d 225 (Fla.1991).

Reversed.

William SIMMONS, Appellant,

v.

STATE of Florida, Appellee.

No. 90-3499.

District Court of Appeal of Florida, First District.

Nov. 4, 1991.

On Motion for Rehearing or Certification Dec. 13, 1991.

Defendant appealed from his conviction in the Circuit Court, Duval County, David Wiggins, J., on drug charges. After initially affirming conviction, the District Court of Appeal, Wolf, J., on motion for rehearing or certification, held that issue of whether objective entrapment test of case law had been abolished by enactment of entrapment statute was one of great public importance which would be certified to the Florida Supreme Court.

Motion granted in part.

Constitutional Law ⇐257.5
Criminal Law ⇐36.5

Permissible police conduct is limited by due process considerations such that prosecution of defendant may be barred where government's involvement in criminal enterprise is so extensive that it may be characterized as outrageous. U.S.C.A. Const. Amend. 14.

Appeal from the Circuit Court for Duval County; David Wiggins, Judge.

Nancy A. Daniels, Public Defender, Nancy L. Showalter, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., Gypsy Bailey, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

Simmons appeals from a judgment and sentence for two counts of sale or delivery of cocaine and two counts of possession of

App. 6

cocaine. He asserts on appeal that the trial court erred in denying his motion for judgment on acquittal on the grounds that the facts established entrapment as a matter of law in light of the holding in *Cruz v. State*, 465 So.2d 516 (Fla.1985), *cert. denied*, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985). We find no merit in this contention as a result of the opinion of this court in *State v. Munoz*, 586 So.2d 515 (Fla. 1st DCA 1991).

BOOTH, WOLF and KAHN, JJ., concur.

ON MOTION FOR REHEARING OR CERTIFICATION

WOLF, Judge.

Appellant seeks rehearing or certification, arguing that current law from other districts is in conflict with this court's decision which relied on *State v. Munoz*, 586 So.2d 515 (Fla. 1st DCA 1991), to affirm the trial court's denial of the appellant's motion for judgment of acquittal. In *Munoz*, this court aligned itself with the Third District Court of Appeal in *Gonzalez v. State*, 571 So.2d 1346 (Fla. 3rd DCA 1990), *rev. denied*, 584 So.2d 998 (Fla.1991), and with the Fourth District Court of Appeal in *Krajewski v. State*, 587 So.2d 1175 (Fla. 4th DCA 1991), *quashed on other grounds*, 589 So.2d 254 (Fla.1991), holding that section 777.201, Florida Statutes (1987), effectively abolished the objective entrapment test set forth in *Cruz v. State*, 465 So.2d 516 (Fla.1985), *cert. denied*, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985). The appellant argues that in *Strickland v. State*, 588 So.2d 269 (Fla. 4th DCA 1991), the Fourth District Court of Appeal has receded from *Krajewski*. *Strickland* relies, however, on the Florida Supreme Court's opinion in *State v. Hunter*, 586 So.2d 319 (Fla.1991), where the court applied *Cruz* in a due process analysis, but did not address section 777.201, Florida Statutes.

A review of current law shows that, even if the fourth DCA intends to recede from its holding in *Krajewski*, the 3rd DCA still expressly holds that section 777.201 has abolished the *Cruz* objective entrapment test. *See Gonzalez v. State, supra; State v. Lopez*, 522 So.2d 537 (Fla. 3rd DCA 1988). The only case which expressly declines to find that the objective entrapment test of *Cruz* has been abolished by statute at this time is the Second District Court of Appeal's opinion in *Bowser v. State*, 555 So.2d 879 (Fla. 2nd DCA 1989). The Fifth District Court of Appeal has applied *Cruz* since the enactment of section 777.201, Florida Statutes, but has not to date addressed the effect of the statute on the *Cruz* objective entrapment test. *See Smith v. State*, 575 So.2d 776 (Fla. 5th DCA 1991); *State v. Purvis*, 560 So.2d 1296 (Fla. 5th DCA 1990).

We recognize, as expressed by the Third District Court of Appeal in *Gonzalez*, an intent by the Legislature to do away with the *Cruz* objective entrapment test. At the same time, we recognize that due process considerations parallel the objective entrapment test, and permissible police conduct must be limited by constitutional due process. That is, "prosecution of a defendant may be barred where the government's involvement in the criminal enterprise 'is so extensive that it may be characterized as "outrageous."'" *Gonzalez, supra* at 1350, quoting *Brown v. State*, 484 So.2d 1324, 1327 (Fla. 3rd DCA 1986). The Florida Supreme Court has also noted, in the *Cruz* opinion, that objective entrapment involves issues which may overlap or parallel due process concerns. *Cruz*, 465 So.2d at 519 n. 1.

In *Hunter, supra*, the defendant below had raised a defense of entrapment under *Cruz*, but on appeal the primary issue was whether police conduct violated due process. In *Hunter* the supreme court held that objective entrapment under *Cruz* included due process considerations. The discussion in *Hunter* of due process considerations in light of an entrapment analysis does not answer the question of whether entrapment as a matter of law continues to exist where the police conduct does not rise to the level of a due process violation. While the Florida Supreme Court has indicated in *Hunter* that *Cruz* may be alive and well for purposes of due process analy-

sis, it has failed to address the effect of section 777.201, Florida Statutes (1987), on the *Cruz* objective entrapment test. We, therefore, certify the following question as one of great public importance:

HAS THE OBJECTIVE ENTRAPMENT TEST SET FORTH IN *CRUZ V. STATE*, 465 So.2d 516 (Fla.1985), *cert. denied*, 473 U.S. 905 [105 S.Ct. 3527, 87 L.Ed.2d 652] (1985), BEEN ABOLISHED BY THE ENACTMENT OF SECTION 777.-201, FLORIDA STATUTES (1987)?

Appellant's motion for rehearing or certification is granted to the extent indicated herein.

BOOTH and KAHN, JJ., concur.

Osmani SANTA CRUZ and Albert DeLara, Appellants,

v.

NORTHWEST DADE COMMUNITY HEALTH CENTER, INC., Appellee.

No. 90–662.

District Court of Appeal of Florida, Third District.

Nov. 5, 1991.

Rehearing Denied Jan. 15, 1992.

Persons who were shot by mental health patient brought action against mental health center. The Circuit Court, Dade County, Amy Steele Donner, J., dismissed, and victims appealed. The District Court of Appeal held that: (1) victims could not maintain medical malpractice action against health center, and (2) health center owed no duty to the victims to protect them from the patient.

Affirmed.

1. Mental Health ⇐414(2)

Persons who were shot by patient of mental health center did not have a medical malpractice action against the center as they were not patients of the medical staff there.

2. Mental Health ⇐414(2)

There was no affirmative obligation on the part of psychiatrist or mental health center to detain voluntary patient or to have him involuntarily committed, and they could not be held liable for failing to do so to those subsequently injured by the patient.

3. Negligence ⇐4

For purposes of rule that one who takes charge of a third person whom he knows to be likely to cause bodily harm to others is under duty to exercise reasonable care to control the third person to prevent that harm, "one who takes charge" is one who has the right and duty to control the third person's behavior.

4. Mental Health ⇐414(2)

Even if mental health center knew that patient whom it was treating had escaped from another institution to which he had been involuntarily committed, that did not give rise to duty of center to third parties to prevent the patient from harming them.

Touby Smith DeMahy & Drake, and Kenneth R. Drake, Miami, for appellants.

McIntosh & Craven and Douglas M. McIntosh and Carmen Y. Cartaya, Ft. Lauderdale, for appellee.

Osborne, McNatt, Cobb, Shaw, O'Hara & Brown and Jack W. Shaw, Jr., Jacksonville, for amicus curiae, Florida Defense Lawyers Ass'n.

Before HUBBART, BASKIN and COPE, JJ.

PER CURIAM.

Plaintiffs Osmani Santa Cruz and Albert DeLara appeal the dismissal of their complaint for medical malpractice against Northwest Dade Community Mental Health Center (Northwest Dade). We affirm.

ert A. Butterworth, Atty. Gen., and Charlie McCoy, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

AFFIRMED. *See Blackmon v. State*, 570 So.2d 1074 (Fla. 1st DCA 1990).

JOANOS, C.J., and BOOTH and WOLF, JJ., concur.

STATE of Florida, Appellant,

v.

Manuel MUNOZ, Appellee.

No. 91-8.

District Court of Appeal of Florida, First District.

Oct. 8, 1991.

Appeal from the Circuit Court for Bay County; Clinton E. Foster, Judge.

Robert A. Butterworth, Atty. Gen., Laura Rush, Asst. Atty. Gen., Tallahassee, for appellant.

Alvin L. Peters of McCauley & Peters, Panama City, for appellee.

PER CURIAM.

The State of Florida appeals from a final order dismissing an information against Manuel Munoz. The trial judge dismissed the charge finding that the Florida Supreme Court's two-prong test for entrapment set forth in *Cruz v. State*, 465 So.2d 516 (Fla.1985), *cert. denied*, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985), constituted binding precedent as to this case. The state asserts that the enactment of section 777.201, Florida Statutes (1987), abolished the objective entrapment test as set forth in *Cruz, supra*. For the reasons set forth in *Gonzalez v. State*, 571 So.2d 1346 (Fla. 3rd DCA 1990), and *Krajewski v. State*, — So.2d —, 16 F.L.W. D692 (Fla. 4th DCA March 13, 1991), we accept the arguments of the state and reverse the decision of the trial court.

SHIVERS and WOLF, JJ., and WENTWORTH, Senior Judge, concur.

Johnny Lee GIBSON, Appellant,

v.

STATE of Florida, Appellee.

No. 91-613.

District Court of Appeal of Florida, First District.

Oct. 8, 1991.

An Appeal from the Circuit Court for Leon County. F.E. Steinmeyer, III, Judge.

Johnny Lee Gibson, pro se.

No appearance for appellee.

PER CURIAM.

AFFIRMED. *See Alvarez v. State*, 358 So.2d 10 (Fla.1978).

JOANOS, C.J., and BOOTH and WOLF, JJ., concur.

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durally barred. *Atkins v. Dugger*, 541 So.2d 1165 (Fla.1989).

Therefore, we deny the petition for writ of habeas corpus.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, BARKETT, GRIMES, KOGAN and HARDING, JJ., concur.

STATE of Florida, Petitioner,

v.

David William HUNTER and Kelly I. Conklin, Respondents.

No. 73230.

Supreme Court of Florida.

Aug. 29, 1991.

Defendants were convicted in the Circuit Court, Broward County, Thomas M. Coker, Jr., J., of trafficking in cocaine and conspiracy, and defendants appealed. The District Court of Appeal, 531 So.2d 239, found due process violation and certified questions. The Supreme Court, McDonald, J., held that: (1) defendant repeatedly telephoned by State agent for assistance in obtaining drugs established entrapment defense, but (2) second defendant, who was brought into scheme by first defendant, not agent, and whose involvement was wholly voluntary, should not have been allowed to raise entrapment defense.

Affirmed in part and reversed in part.

Barkett, J., filed concurring and dissenting opinion in which Kogan, J., concurred.

Kogan, J., filed concurring and dissenting opinion in which Barkett, J., concurred.

1. Criminal Law ⇐36.5

Agreement giving someone direct financial stake in successful criminal prosecution and requiring person to testify in order to produce successful prosecution is so fraught with danger of corrupting criminal justice system through perjured testimony that it cannot be tolerated.

2. Constitutional Law ⇐257.5
Criminal Law ⇐37(2)

Due process considerations are included in threshold test for establishing entrapment, under which entrapment has not occurred where police activity has as its end interruption of specific ongoing criminal activity and utilizes means reasonably tailored to apprehend those involved in that activity. U.S.C.A. Const.Amend. 14.

3. Criminal Law ⇐37(8)

Defendant repeatedly telephoned by state agent for assistance in obtaining drugs established entrapment defense to charge of trafficking and conspiracy, as there was no specific ongoing criminal activity until agent created such activity in order to meet his quota under agreement with State, pursuant to which he had to produce stated amount of cocaine.

4. Criminal Law ⇐37(2)

When middleman, not state agent, induces another person to engage in crime, entrapment is not available defense.

5. Criminal Law ⇐37(8)

Defendant brought into drug transaction by middleman, rather than by state agent, and whose involvement was wholly voluntary, should not have been allowed to raise entrapment defense to charges of trafficking and conspiracy.

6. Constitutional Law ⇐42.2(1)

Defendants cannot raise due process violations allegedly suffered by third parties.

7. Constitutional Law ⇐42.2(1)
Criminal Law ⇐36.5

Defendant's outrageous conduct/due process claim challenging agreement between state and state's agent, under which reduction of agent's sentence depended

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upon his production of stated amount of cocaine, would not be heard, as defendant was brought into drug transaction by middleman, not agent. U.S.C.A. Const.Amend. 14.

Robert A. Butterworth, Atty. Gen., and John Tiedemann and Richard G. Bartmon, Asst. Attys. Gen., West Palm Beach, for petitioner.

Christopher A. Grillo, Fort Lauderdale, for respondent, David William Hunter.

Fred Haddad, Fort Lauderdale, for respondent, Kelly I. Conklin.

McDONALD, Justice.

We review *Hunter v. State*, 531 So.2d 239 (Fla. 4th DCA 1988), in which the district court certified two questions as being of great public importance. We have jurisdiction pursuant to article V, section 3(b)(4), Florida Constitution, and quash *Hunter*.

The chief prosecution witness in the instant case, Ron Diamond, had been convicted of drug trafficking and sentenced to fifteen years in prison and a $250,000 fine. Diamond sought a sentence reduction under subsection 893.135(3), Florida Statutes (1985), which provided in pertinent part that a prosecutor can request that the sentencing court reduce or suspend a sentence for drug trafficking if the defendant "provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, coconspirators, or principals." Based on this statute, the trial court agreed to release Diamond at various times both before and after his conviction so that he could assist the police.

Because Diamond could not produce any past accomplices the state offered him a "contract" if he assisted in identifying and arresting *future* accomplices. The major condition of the agreement was that Diamond's assistance had to result in the confiscation of at least four kilograms of cocaine within a certain period of time. Diamond subsequently assisted the police in "making" several new drug cases, but fell short of his cocaine quota by one kilogram. The trial court then permitted Diamond to remain at liberty if within sixty days he gave the police information that led to the confiscation of the remaining kilogram.

During the sixty-day period, Diamond noticed that another resident of his apartment complex, Kelly Conklin, openly smoked marijuana. Conklin, a twenty-one-year-old recent graduate of an art school, had no prior criminal record. He lived with his pregnant girlfriend and worked for an advertising firm run by David Hunter. Approaching Conklin, Diamond asked for assistance in obtaining drugs, but Conklin could not provide any sources for the drugs that Diamond wanted. Diamond became more insistent and began telephoning Conklin almost daily. Eventually Conklin turned to Hunter, who agreed to help find drugs to sell to Diamond.[1] Hunter sought out a former employee who provided the drugs, but, in doing so, insisted that Hunter, not Conklin, complete the transaction.[2] When Hunter attempted to close the transaction with the police undercover buyers, both he and Conklin were arrested. They were charged with trafficking and conspiracy and raised entrapment under *Cruz v. State*, 465 So.2d 516 (Fla.), *cert. denied*, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985), as a defense. The jury, however, convicted them as charged, and they received minimum mandatory sentences of fifteen years' imprisonment as well as $250,000 fines.

Hunter and Conklin raised several issues on appeal, including whether, under *State v. Glosson*, 462 So.2d 1082 (Fla.1985), Diamond's conduct violated their due process rights so that the charges against them should have been dismissed. The district court decided the appeal on the *Glosson*

1. Thereafter, Diamond had two or three telephone conversations with Hunter urging the completion of the transaction, but never met Hunter until the day of the scheduled transaction.

2. On the day of the scheduled transaction, the supplier took Hunter's daughter with him and watched the transaction from a safe vantage point. When Conklin and Hunter were arrested, he fled and was not apprehended.

ue and did not address the other issues. After finding a due process violation, the court certified the following questions:

> Does an agreement whereby a convicted drug trafficker will receive a substantially reduced sentence in exchange for setting up new drug deals and testifying for the state violate the holding in *State v. Glosson?*
>
> Assuming the existence of a due process violation under *Glosson*, does *Glosson*'s holding extend to a codefendant who was not the direct target of the government's agent?

Hunter, 531 So.2d at 243. We find *Glosson* distinguishable from the instant case and hold that the district court should not have decided the case as it did. Therefore, we answer the certified questions in the negative as qualified and explained below.

[1] In *Glosson* the state and an informant made a contingent-fee agreement under which the informant would receive ten percent of all civil forfeitures in exchange for his testimony and cooperation in the criminal prosecutions which produced the forfeitures. The informant "had to testify and cooperate in criminal prosecutions in order to receive his contingent fee from the connected civil forfeitures, and *criminal convictions could not be obtained ... without his testimony.*" *Glosson*, 462 So.2d at 1085 (emphasis added). Under such circumstances, maintaining the integrity of a fair prosecution superseded prosecuting defendants who might have been guilty. Because this Court found the misconduct in *Glosson* so egregious, we stated and held:

> We can imagine few situations with more potential for abuse of a defendant's due process right. The informant here had an enormous financial incentive not only to make criminal cases, but also to color his testimony or even commit perjury in pursuit of the contingent fee. The due process rights of all citizens require us to forbid criminal prosecutions based upon the testimony of vital state witnesses who have what amounts to a financial stake in criminal convictions.
>
> Accordingly, we hold that a trial court may properly dismiss criminal charges for constitutional due process violations *in cases where an informant stands to gain a contingent fee conditioned on cooperation and testimony in the criminal prosecution when that testimony is critical to a successful prosecution.*

Id. (emphasis added). We reiterate that an agreement giving someone a direct financial stake in a successful criminal prosecution and requiring the person to testify in order to produce a successful prosecution is so fraught with the danger of corrupting the criminal justice system through perjured testimony that it cannot be tolerated.

Gaining or preserving one's liberty could produce as great an interest in the outcome of a criminal prosecution as a financial interest, but that is not the case here. *Glosson* is very fact specific, and several facts distinguish the instant case from *Glosson*. Although Diamond testified against Conklin and Hunter, his agreement with the state did not require that he do so. Rather, Diamond had to produce a stated amount of cocaine. The reduction of his sentence depended upon reaching a quota, not upon his testifying or upon the state's obtaining convictions. In *Glosson*, on the other hand, the informant would be paid only if he testified and the state won a conviction. The possibility, perhaps even probability, of perjury present in *Glosson* was much greater than in the instant case. Thus, we conclude that *Glosson* does not control this case.

In *Myers v. State*, 494 So.2d 517 (Fla. 4th DCA 1986), the district court applied *Cruz*, on which Conklin and Hunter relied at trial, to facts very similar to those in the instant case. In fact, in his brief Conklin characterizes *Myers* as "the proverbial 'case on all fours' with the instant matter." We agree and hold that the district court should have decided this appeal on the entrapment issue rather than under *Glosson*.

[2] In *Cruz* we stated that the state must "establish initially whether 'police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmen-

tal power.'" 465 So.2d at 521 (quoting *Sherman v. United States*, 356 U.S. 369, 382, 78 S.Ct. 819, 825, 2 L.Ed.2d 848 (1958), Frankfurter, J., concurring in result). To guide trial courts, we set out a threshold test for establishing entrapment: "Entrapment has *not* occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity." *Id.* at 522 (emphasis added). By focusing on police conduct, this objective entrapment standard includes due process considerations.

[3] Diamond had become the state's agent, and his acts must be construed as "police activity." His activities, however, meet neither part of the *Cruz* test, let alone both, because there was no "specific ongoing criminal activity" until Diamond created such activity in order to meet his quota. Therefore, as in *Cruz*, Conklin established entrapment as a matter of law, and the trial court erred in denying his motion for judgment of acquittal based on entrapment. *Cf. Myers; Marrero v. State*, 493 So.2d 463 (Fla. 3d DCA 1985), *review denied*, 488 So.2d 831 (Fla.1986).

[4–7] Conklin's benefitting from the entrapment defense, however, does not mean that Hunter should too. Although Diamond's acts amounted to entrapment of Conklin, the middleman, he had minimal telephone contacts with Hunter. When a middleman, not a state agent, induces another person to engage in a crime, entrapment is not an available defense. *State v. Garcia*, 528 So.2d 76 (Fla. 2d DCA), *review denied*, 536 So.2d 244 (Fla.1988); *Acosta v. State*, 477 So.2d 9 (Fla. 3d DCA 1985); *State v. Perez*, 438 So.2d 436 (Fla. 3d DCA 1983). Conklin, not Diamond, brought Hunter into the scheme, and Hunter's involvement was wholly voluntary even though his motive may have been benevolent. Hunter, therefore, should not have been allowed to raise entrapment. Also, defendants cannot raise "due process violations allegedly suffered by third parties." *United States v. Valdovinos–Valdovinos*, 743 F.2d 1436, 1437 (9th Cir.1984), *cert. denied*, 469 U.S. 1114, 105 S.Ct. 799, 83 L.Ed.2d 791 (1985); *accord United States v. Payner*, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980); *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976). Thus, Hunter's outrageous conduct/due process claim should not be heard.

Accordingly, although we disagree with the rationale of the district court, we approve its result as to Conklin, but quash its opinion entirely as to Hunter. We remand with instructions that the trial court's denial of Conklin's motion for judgment of acquittal be reversed and that Hunter's conviction be affirmed.

It is so ordered.

SHAW, C.J., and OVERTON and GRIMES, JJ., concur.

BARKETT, J., concurs in part and dissents in part with an opinion, in which KOGAN, J., concurs.

KOGAN, J., concurs in part and dissents in part with an opinion, in which BARKETT, J., concurs.

BARKETT, Justice, concurring in part, dissenting in part.

I agree with the majority regarding Conklin. I believe, however, that the rationale precluding the conviction of Conklin ineluctably leads to applying the same conclusion to Hunter. Accordingly, I concur with Justice Kogan's analysis. Because the state used illegal means to induce Diamond to "make" these cases against both Hunter and Conklin, we are bound under principles of due process, ethics, and public policy to reverse these convictions.

I also write to emphasize, as this case illustrates, the dangers resulting from the permitted abuse of the concept of "substantial assistance." If properly used by law enforcement, "substantial assistance" can be a laudable and workable tool in the war against drug-related crime. "Substantial assistance" was intended to induce defendants to give information to the authorities about accomplices, accessories, coconspirators, principles, or others known to the

endant or to the state to have been engaged in or to be presently engaging in, the trafficking of controlled substances.[3] But, as this case so aptly illustrates, some have allowed "substantial assistance" to go well beyond both what the legislature intended and what the legislature is constitutionally permitted to authorize. As in this instance, it is being used to *create new criminal activity* under the guise of taking criminals off the streets. "[T]he legislature cannot authorize an informant to manufacture crime." *State v. Embry*, 563 So.2d 147, 149 (Fla. 2d DCA 1990).

"Substantial assistance" is useful to society when applied to someone deep in the drug world. Generally, a first-time offender, or a mere "mule" or drug courier,[4] would not have available the same kind of information to trade that an experienced drug "kingpin" would have. Ironically, "substantial assistance" permits those who are the *most culpable*, and therefore, most knowledgeable, to obtain probation or reduced sentences in exchange for their knowledge. Those who are the *least culpable*, because of their limited involvement and knowledge, have little to trade, and accordingly they are left to suffer the greater punishment of the minimum mandatory prison sentences.

The abuse of "substantial assistance" creates a worse, and in my view, indefensible, irony. Persons with the least exposure to the criminal element have the greatest terror of incarceration. Likewise, they are probably the candidates most likely to successfully complete probation and turn away from any further criminal conduct. However, we use their fear, not to turn them away from crime, but rather to induce them to create more crime.[5] Thus, instead of encouraging lawbreakers to reject the criminal life-style, this practice requires them to remain in the criminal milieu and generate more crime.

Moreover, exposure to danger should not be a condition of probation. In this case, there was apparently little danger to Diamond. This is not always the case. Untrained and unsupervised informants may be forced into dangerous situations that they are ill-equipped to handle, simply as a condition of probation under the "substantial assistance" statute. "[I]nformers frequently put their lives on the line to make these cases." *Krajewski v. State*, 587 So.2d 1175, 1183 (Fla. 4th DCA 1991). Surely, due process does not permit this kind of probationary condition.

I do not quarrel with any conditions of "substantial assistance" that would require an offender to report information obtained in the natural course of living. For example, in this case Diamond observed Conklin openly smoking marijuana. Diamond could have relayed this information to the police, and should be encouraged to do so to prevent crime. This is a far cry from generating a crime for the police to solve, a crime that would never have been committed but for the police action in the first place.

Finally, I am deeply concerned with the complicity of the courts in this process. Diamond was convicted of drug offenses and sentenced to the minimum mandatory term of fifteen years' imprisonment in May 1982. However, the trial court allowed Diamond to stay on the streets to "make cases" for the state until Diamond finally

3. The controlling statute in effect in this case provided that the state may move to reduce or suspend the sentence of a defendant who provides "substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, coconspirators, or principles." § 893.135(3), Fla.Stat. (1985). The legislature subsequently expanded the statute to benefit defendants who provide "substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, coconspirators, or principles *or of any other person engaged in trafficking in controlled substances.*" Ch. 87-243, § 5, Laws of Fla. (codified at § 893.135(4), Fla.Stat. (1987)) (underscore in original). In neither version of the statute does the legislature direct the use of "substantial assistance" to manufacture crime, nor may the legislature do so. *See, e.g., State v. Embry*, 563 So.2d 147, 149 (Fla. 2d DCA 1990).

4. In many instances, these are young individuals with no prior criminal record.

5. As the majority recognizes, we require these persons to turn in "*future* accomplices." Op. at 320 (emphasis in original).

snared Conklin and Hunter in mid-October 1982, after which the court reduced Diamond's sentence. The trial court had no authority to keep Diamond out of jail and reduce his lawful sentence *five months* after it imposed sentence. *See* Fla.R.Crim.P. 3.800(b) (a trial court may modify a legal sentence within sixty days after imposing sentence); *see also* § 893.135(2), Fla.Stat. (1981) ("with respect to any person who is found to have violated [drug trafficking laws], adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the minimum mandatory term of imprisonment prescribed by this section."). As Judge Anstead, writing for the court, observed, "Diamond was actually out of jail illegally at the time he induced Conklin to traffic in cocaine." *Hunter v. State*, 531 So.2d 239, 243 (Fla. 4th DCA 1988). Thus, we have allowed the abuse of "substantial assistance" to infect the courts themselves.

It would be neither logical nor constitutional for the legislature to spend our financial resources to create crime. A society that permits violation of the law as a means of convicting a lawbreaker is just as lawless as the individual it convicts. I cannot believe that the ends of law enforcement ever justify the means of lawbreaking.

Accordingly, I am persuaded that "substantial assistance," when used as in this case to force a defendant to "make" new crimes, is legally wrong in its violation of due process, morally reprehensible, and directly antithetical to the public good. It is, in a twist worthy of Charles Dickens, simply using the law to break the law.

KOGAN, J., concurs.

KOGAN, Justice, concurring in part, dissenting in part.

I fully concur in that part of the majority opinion finding a due process violation in the way the police informant interacted with Conklin. I write separately on this point only to elaborate my understanding of what the Court is doing today.

In *Cruz v. State*, 465 So.2d 516, 521 (Fla.), *cert. denied*, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985), this Court held that Florida law simultaneously recognizes the existence of both "subjective" and "objective" entrapment defenses. "Subjective entrapment" is the theory generally followed in the federal system. It focuses on whether the defendant was predisposed to commit a particular offense. If so, entrapment usually is not an available defense no matter what conduct the police may have used in apprehending the defendant. In any event, subjective entrapment typically is not a question of law, but a question of fact for the fact finder to decide. *Id.* at 520–21 (citing *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932).

"Objective entrapment," on the other hand, focuses on the objective acts leading up to the defendant's arrest, not on the defendant's predisposition. The question is whether "police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power." *Cruz*, 465 So.2d at 521 (quoting *Sherman v. United States*, 356 U.S. 369, 382, 78 S.Ct. 819, 825, 2 L.Ed.2d 848 (1958) (Frankfurter, J., concurring in result). Although the United States Supreme Court has never adopted an objective entrapment analysis, we did so as a matter of Florida law in *Cruz:*

> Entrapment has not occurred as a matter of law where police activity (1) has as its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity.

The first prong of this test addresses the problem of police "virtue testing," that is, police activity seeking to prosecute crime where no such crime exists but for the police activity engendering the crime. As Justice Roberts wrote in his separate opinion in *Sorrells*, "Society is at war with the criminal classes," 287 U.S. at 453–54, 53 S.Ct. at 217. Police must fight this war, not engage in the manufacture of new hostilities.

The second prong of the threshold test addresses the problem of inappropriate techniques. Considerations in deciding whether police activity is permissible under this prong include whether a government agent "induces or encourages another person to engage in conduct constituting such offense by either: (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." Model Penal Code § 2.13 (1962).

Cruz, 465 So.2d at 522. The question of whether police conduct meets the *Cruz* objective standard is one entirely of law. *Id.* at 521.

The *Cruz* Court did not directly confront whether the objective test finds its origin in the Florida Constitution, although it did note that the *federal* advocates of the objective standard had not claimed a constitutional basis for their views. *Id.* at 520 n. 2 (discussing opinions of federal justices favoring objective standard). The *Cruz* Court did, however, note that the objective entrapment defense involves issues that substantially overlap due process concerns. *Id.* at 519 n. 1 (citing cases so holding).

Today, the majority opinion resolves the question of the source of Florida's objective entrapment defense. The majority holds that "this objective entrapment standard includes due process considerations." Majority op. at 322. It goes on to deny Hunter's claim because he allegedly is vicariously asserting the due process rights of Conklin. *Id.* at 322. Because the federal system does not recognize the objective entrapment defense, the majority opinion clearly is premised entirely on the due process clause of the Florida Constitution. Art. I, § 9, Fla. Const. I fully concur in this conclusion. Indeed, I believe it necessarily flows from our prior case law.

In *Glosson*, for example, we held that the due process clause of the Florida Constitution, article I, section 9, restricts the ability of the state to apprehend criminal wrongdoers if the state does so through serious misconduct of its own. *Glosson*, 462 So.2d at 1084–85. The *Glosson* Court did not expressly characterize this as an objective entrapment analysis, but a review of that case shows that it indeed was. *Glosson* merely confronted a particularly egregious violation. Thus, although I agree that both this case and *Glosson* properly are decided based on Florida due process concerns, I disagree with that part of the majority analysis suggesting that *Glosson* created a defense distinct from objective entrapment. The two plainly are coextensive.

Indeed, *Glosson* obviously was concerned with whether "police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power." *Cruz*, 465 So.2d at 521 (quoting *Sherman v. United States*, 356 U.S. 369, 382, 78 S.Ct. 819, 825, 2 L.Ed.2d 848 (1958) (Frankfurter, J., concurring in result). In *Glosson*, the state had offered the confidential informant a "contingent fee" arrangement. This arrangement provided that, if the informant obtained information about and testified against defendants, he then would be paid a percentage of any civil forfeitures associated with the trials. We noted that there are

> few situations with more potential for abuse of a defendant's due process right. The informant here had an enormous financial incentive not only to make criminal cases, but also to color his testimony or even commit perjury in pursuit of the contingent fee. The due process rights of all citizens require us to forbid criminal prosecutions based upon the testimony of vital state witnesses who have what amounts to a financial stake in criminal convictions.

Glosson, 462 So.2d at 1085.

In deciding *Glosson* we drew upon an opinion of our sister Court in New York, *People v. Isaacson*, 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78 (1978). *See Glosson*, 462 So.2d at 1085. The *Isaacson* Court dealt with a situation in which police had brutalized and deceived an informant to encourage him to entrap others, and the

informant subsequently pleaded with a friend in another state to supply him with drugs. Later, the informant engaged in an elaborate series of maneuvers to trick his friend into crossing a state line so that a drug deal could be consummated in the jurisdiction of the police for whom the informant worked. *Isaacson*, 406 N.Y.S.2d at 720–721, 378 N.E.2d at 84.

The New York court determined that this type of police conduct offended due process, requiring that the defendant's conviction be vacated. It concluded that

> [s]eparately considered, the items of conduct may not rise to a level justifying dismissal but viewed in totality they reveal a brazen and continuing pattern in disregard of fundamental rights.

Id. I believe the majority opinion issued today is in general harmony with the principles announced by the New York court. Clearly, Florida's own due process, objective entrapment defense would prohibit similar conduct on the part of police and their informants in this state. Art. I, § 9, Fla. Const.

Indeed, Florida's due process provision, like that in New York, was meant to guarantee

> that every person's right to life, liberty and property is to be accorded the shield of inherent and fundamental principles of justice. Due process of law guarantees respect for personal immunities "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Isaacson, 406 N.Y.S.2d at 718, 378 N.E.2d at 82 (citations omitted).

It is clear that the concerns elaborated in *Glosson* and the cases on which it relied disclose that they are essentially aimed at the same concerns as the objective entrapment analysis used in *Cruz*. The opinions in *Glosson*, *Isaacson*, and *Cruz* forbid prosecution if government agents are "seeking to prosecute crime where no such crime exists but for the police activity engendering the crime." *Cruz*, 465 So.2d at 522. These cases likewise forbid prosecution if a government agent "induces or encourages another person to engage in conduct constituting [an] offense by either: (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." *Id.* (quoting *Model Penal Code* § 2.13 (1962)).

Indeed, the New York court in *Isaacson*—cited in our own *Glosson* opinion—used a highly similar analysis. The *Isaacson* court held that the following nonexclusive list of factors should be considered in reviewing claims of a due process violation:

> (1) [W]hether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal activity; (2) whether the police themselves engaged in criminal [or] improper conduct repugnant to a sense of justice; (3) whether the defendant's reluctance to commit the crime is overcome by appeals to humanitarian instincts such as sympathy or past friendship, by temptation of exorbitant gain, or by persistent solicitation in the face of unwillingness; and (4) whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace.

Isaacson, 406 N.Y.S.2d at 719, 378 N.E.2d at 83 (citations omitted). The four factors used in *Isaacson* are another slightly more detailed way of looking at the two-part test used in *Cruz*.

I stress, however, that due process does not bar the state from using paid informants or even from using stealth and strategy in the apprehension of lawbreakers. Art. I, § 9, Fla. Const. As the New York Court noted:

> To be sure, "[c]riminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer." However, ... "[n]o matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of

society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society."

Isaacson, 406 N.Y.S.2d at 721, 378 N.E.2d at 85 (citation omitted) (quoting *Sherman v. United States*, 356 U.S. 369, 372, 382–83, 78 S.Ct. 819, 820–21, 826, 2 L.Ed.2d 848 (1958) (majority opinion and opinion of Frankfurter, J., concurring)). *Accord Cruz*, 465 So.2d at 519. Nor does due process bar the use of informants where the state employs them as the result of reasonable, objective suspicion that the particular persons under investigation *already* are engaging in criminal conduct.

I dissent from the majority's conclusion that Hunter may not also resort to the objective entrapment defense. Based on this record, I believe the taint flowing from Diamond's activities applies equally to the prosecution of both Hunter and Conklin. The record discloses that neither Conklin nor Hunter would have been involved in the attempted sale of cocaine *but for* Diamond's intensive and unrelenting efforts to meet his "cocaine quota." Diamond had direct contact with *both* Hunter and Conklin, even though it was Conklin who initially brought Hunter into the scheme. After meeting Hunter, Diamond used the same techniques against him that were employed against Conklin. Diamond's direct interaction with Hunter was extensive.

This informant's activities in essence manufactured crime in which neither Hunter nor Conklin would have participated except for the police activities. On these facts, Hunter is not vicariously attempting to assert Conklin's due process rights; he is asserting his own. Thus, the *Glosson* violation applies equally to Conklin and Hunter, even though only Conklin was initially targeted by the informant. In this vein, the question of either Hunter or Conklin's predisposition is not dispositive of a claim of objective entrapment, for the reasons I have noted earlier. This issue is resolved solely by reference to the conduct of the police informant. I believe the majority is improperly influenced by evidence suggesting that Hunter was predisposed to commit drug-related crimes.

BARKETT, J., concurs.

In re ESTATE OF Harvey S. WARWICK, Deceased.

No. 74349.

Supreme Court of Florida.

Oct. 3, 1991.

Application for Review of the Decision of the District Court of Appeal—Direct Conflict of Decisions; Fourth District—No. 88–0806 (Palm Beach County).

Louis L. Hamby III of Alley, Maass, Rogers & Lindsay, P.A., Palm Beach, for petitioner.

James E. Weber of James E. Weber, P.A., West Palm Beach, for respondent.

Rohan Kelley of Rohan Kelley, P.A., Ft. Lauderdale, and William S. Belcher of Belcher & Fleece, P.A., St. Petersburg, amicus curiae for The Real Property, Probate and Trust Law Section of The Florida Bar.

J. Thomas Cardwell of Akerman, Senterfitt & Eidson, Orlando, amicus curiae for Florida Bankers Ass'n.

OVERTON, Justice.

Petitioner, Julia W. Carswell, co-personal representative and beneficiary of the estate of Harvey S. Warwick, deceased, seeks review of the Fourth District Court of Appeal's decision in *In re Estate of Warwick*, 543 So.2d 449 (Fla. 4th DCA 1989). Petitioner challenges the attorney's fee computed solely on a percentage of Warwick's $1,890,000 estate. We find conflict with *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So.2d 828 (Fla.1990); *De Loach v. Westman*, 506 So.2d 1142 (Fla.2d DCA 1987); and *Brady v. Williams*, 491